Supreme Court, U.S.
FILED

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No. __-____

IN THE
Supreme Court of the United States

October Term, 1997

TRACI ANDERSON and CYNTHIA IRONS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 5, 1998

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QUESTION PRESENTED

Does 28 U.S.C. §2674, which provides, "The United States shall be liable" under the Federal Tort Claims Act "in the same manner and to the same extent as a private individual under like circumstances" would be under state law, waive sovereign immunity from attorneys fee in circumstances where a private individual would be liable for them under a state fee-shifting statute?

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OPINIONS BELOW

The Ninth Circuit's opinion (App. 1-5) is reported at 127 F. 3d 1190. The district court's findings and conclusions (App. 13-53) and order (App. 9-12) are not reported.

JURISDICTION

The Ninth Circuit's judgment was entered on November 4, 1997. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES

28 U.S.C. §2674 provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .

28 U.S.C. §1346(b)(1) provides in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for

> money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2678 provides in pertinent part:

> No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title. . . .

STATEMENT OF THE CASE

Traci Anderson and Cynthia Irons were employees of Vitro Corporation, a private contractor which provides support services to the Navy at its base in Keyport, Washington. While working on the base Anderson and Irons were sexually harassed by civilian employees of the Navy. When Anderson and Irons complained, they met retaliation. Because Anderson and Irons were not government "employees or applicants" eligible to proceed against the government under Title VII (*see*, 42 U.S.C. §2000e 16(a) and (c)), they sued under the Federal Tort Claims Act ("FTCA"). The district court had jurisdiction under 28 U.S.C. §1346(b)(1).

After a four day bench trial, the district court found government employees committed "particularly egregious acts of sexual harassment and retaliation" (App. 11), which "essentially destroyed the health of both [Anderson and Irons] for a considerable period of time" (App. 37). It held the government liable under the FTCA for negligent supervision, negligent infliction of emotional distress and violations of Washington's Law Against Discrimination, Wash. Rev. Code ("RCW") 49.60 (1997), a broad civil rights statute. (App. 40-42, 44-45.) After reducing damages by Vitro's proportionate fault, the district court awarded Anderson and Irons damages against the government. (App. 6-8, 46-52.) Because a plaintiff who prevails under Washington's Law Against Discrimination is

entitled to "cost of suit including reasonable attorneys' fees" (RCW 49.60.030(2)), the district court made a separate award of attorneys fees and expenses[1]:

> The Federal Tort Claims Act, 28 U.S.C. Sec. 2674, clearly states that the government shall be liable as if it were a private individual in like circumstances. . . . If the government were a private person in violation of RCW 49.60.030, it would clearly be liable for the plaintiff's attorneys fees.

(App. 11; *see also*, App. 6-8.)

On appeal the government did not challenge the conclusions it was liable under RCW 49.60 or a private individual would be liable for attorneys fees in like circumstances or argue that an award of attorneys fees fell outside the plain words of 28 U.S.C. §2674. Instead, it urged a narrow construction of the FTCA which would place an award of attorneys fees beyond the waiver of sovereign immunity. The Ninth Circuit did not address the plain language of 28 U.S.C. §2674, but wrote, "There is no mention of waiver of sovereign immunity in [28 U.S.C. §2678, an entirely different section, which is] the only section of the FTCA that mentions attorneys' fees." (App. 4.) Reasoning that "a

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[1] Expenses were awarded as part of attorneys fees.

waiver of sovereign immunity in the FTCA 'is to be construed narrowly'" (App. 4, *quoting Jackson v. United States*, 881 F.2d 707, 712 (9th Cir. 1989)), it reversed the award of attorneys fees and expenses.

REASONS FOR GRANTING THE PETITION

Because the Ninth Circuit's Decision Rests on a Rule of Construction Which this Court Has Rejected for Fifty Years in Federal Tort Claims Act Cases, it Conflicts With Decisions of this Court.

The Ninth Circuit's decision is based solely on a rule of "'construe[ing] narrow[ly]'" the waiver of sovereign immunity in the FTCA. (App. 4, *quoting Jackson v. United States*, 881 F.2d 707, 712 (9th Cir. 1989).) Because this Court has repeatedly rejected such a rule in FTCA cases, the Ninth Circuit's decision conflicts with applicable decisions of this Court.

The FTCA broadly incorporates state law remedies, with several specific exceptions:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances*, but shall not be liable for interest prior to judgment or for punitive

damages. . . .

28 U.S.C. §2674. (Emphasis added.) Because sovereign immunity is waived when a statute authorizes relief against the government (*United States v. Mitchell*, 445 U.S. 535, 538 (1980)), 28 U.S.C. §2674 waives the government's immunity. By its plain language, 28 U.S.C. §2674 waives sovereign immunity not just for damages, but for any "liab[ility]" with only two exceptions: prejudgment interest and punitive damages. Because Congress did not list attorneys fees among the exceptions, they fall within the waiver. When it held otherwise, the Ninth Circuit departed from two canons this Court has set for construing the waiver of sovereign immunity in the FTCA.

First, "the legislative purpose [of the FTCA] is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962); *accord*, *Kosak v. United States*, 465 U.S. 848, 853 (1984); *United States v. Spelar*, 338 U.S. 217, 219-20 (1949); *see also*, *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (Absent a definition in the FTCA "we construe a statutory term in accordance with its ordinary and natural meaning.") When Congress said, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," it presumably meant what it said. Whether one looks to modern legal dictionaries (*see*, *Meyer*, 510 U.S. at 476) or to legal dictionaries in circulation when the FTCA was passed (*see*, *Molzof v.*

United States, 502 U.S. 301, 307 (1992)), the words "liable" and "liability" are commonly used as broad terms, which encompass any type of exposure or obligation, not just exposure or obligation to pay damages. *Black's Law Dictionary* p. 914 (6th ed. 1990); *Black's Law Dictionary* p. 1102 (3rd ed. 1933); 36 *Corpus Juris* p. 1050 (1st ed. 1924).

Second, the FTCA contains a "broad waiver" of sovereign immunity (*Kosak*, 465 U.S. at 852; *Berkovitz v. United States*, 486 U.S. 531, 535 (1988)) in "sweeping language" (*United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)), the exceptions to which must be express.

> There is no justification for this court to read exemptions into the [FTCA] beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.

Rayonier v. United States, 352 U.S. 315, 320 (1957); *United States v. Muniz*, 374 U.S. 150, 166 (1963) (same); *Yellow Cab*, 340 U.S. at 548-49 n. 5 ("'Where a statute contains a clear and sweeping waiver . . . [a] rule [of strict construction] cannot be had in order to enlarge the exceptions.'") (internal cite omitted); *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949) ("'We are not to add to [the] rigor [of sovereign immunity] by refinement of construction where consent has been announced.'") (internal cite omitted); *Kosak*,

465 U.S. at 853 n. 9 (same); *Block v. Neal*, 460 U.S. 289, 298 (1993) (same); *Dalehite v. United States*, 346 U.S. 15, 31 (1953) ("In interpreting the exceptions to . . . the grant, courts include only those circumstances which are within the words and reason of the exception."); *see also*, *United States v. Nordic Village*, Inc., 503 U.S. 30, 34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318 n. 6 (1986).

Although the Court narrowly construes waivers of sovereign immunity in other situations, it has "narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act [cites omitted] or as in the context of equally broad 'sue and be sued' clauses [Cites omitted]." *Nordic Village*, 503 U.S. at 33-34 (emphasis added).

Congress has specified the exceptions to the broad incorporation of state law remedies under the FTCA. *See, e.g.*, 28 U.S.C. §2674 (no prejudgment interest or punitive damages); *ibid.* (compensatory damages allowed in circumstances where state law does not allow them); 28 U.S.C. §2401(b) (federal statute of limitations applies); 28 U.S.C. §2402 (no jury trial). *See also*, *Richards*, 369 U.S. at 14 and n. 28. Significantly, awards of attorneys fees are not among the exceptions.

When the FTCA was first enacted, Congress did list attorneys fees among the exceptions to its incorporation of state law remedies. But Congress has since repealed the attorneys fee exception. When passed in 1946 the FTCA provided:

> Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

Pub. L. 601, ch. 753, §410(a), 60 Stat. 844. With the 1948 amendments to the judicial code, this provision was incorporated into what was then 28 U.S.C. §2412(c), which provided:

> In an action under subsection (b) of section 1346 of this title [which includes suits under the FTCA], costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorneys fees.

Pub. L. 773, ch. 161, §2412(c), 62 Stat. 973. *See also*, *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 268 n. 42 (1975). However, Congress deleted this provision in 1966 when it passed what is now codified

as 28 U.S.C. §2412(a)(1).[2] Pub. L. 89-507, §2412, 80 Stat. 308. Similarly, when the FTCA was first enacted it set a limit on the amount an attorney could charge, but expressly provided the fees were "to be paid out of but not in addition to the amount of the judgment . . . recovered." Pub. L. 601, ch. 753, §422, 60 Stat. 846. The FTCA still contains a ceiling on the amount an attorney can charge. 28 U.S.C. §2678. However, in 1966 Congress deleted the language which required fees "to be paid out of but not in addition to the amount of the judgment . . . recovered."[3] Pub. L. 89-506, §3, 80 Stat. 307.

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[2] One cannot assume the prohibition against awarding attorneys fees under the FTCA became unnecessary in light of the 1966 language which said awards of attorneys fees against the government were generally unavailable unless specifically authorized by statute (Pub. L. 89-507 §2412, 80 Stat. 308), for since 1948, the same statute said awards of attorneys fees against the government were generally unavailable unless "such liability is expressly provided for by Act of Congress" (Pub. L. 773, ch. 161, §2412(a), 62 Stat. 973).

[3] The current 25% ceiling applies to fees for "services." 28 U.S.C. §2678. The amount the district court awarded here for "services" (as opposed to expenses) is less than 25% of the amount of the judgment for damages. (App. 6-8.)

The Ninth Circuit did not reach the government's argument that the FTCA's waiver of sovereign immunity appears in 28 U.S.C. §1346(b)(1), a jurisdictional statute which unlike 28 U.S.C. §2674, uses the phrase "money damages." Although the Court has at times located the waiver in 28 U.S.C. §1346(b)(1) (*see, Meyer*, 510 U.S. at 477; *Smith v. United States*, 507 U.S. 197, 201 (1993)), it has at other times located the waiver in 28 U.S.C. §2674 (*see, Molzof*, 502 U.S. at 306). But even assuming the waiver appears in 28 U.S.C. §1346(b)(1), it is clear other provisions modify the waiver. *See, e.g., Berkovitz*, 486 U.S. at 535 (28 U.S.C. §2680 modifies the waiver); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (28 U.S.C. §2401(b) modifies the waiver). No words could more clearly effect a waiver of sovereign immunity than those with which 28 U.S.C. §2674 begins: "The United States shall be liable . . . " The omission of the phrase "money damages" from 28 U.S.C. §2674 indicates Congress' intent to allow relief beyond money damages.

> "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Keene Corporation v. United States, 508 U.S. 200, 208 (1993) (internal cite omitted).

The Issue Is an Important One.

Because questions of sovereign immunity affect the public's liability, they reach beyond purely private interests. Moreover, any time a court of appeals reverses a district court for following the plain language of a federal statute, an important question is raised.

Although the two circuits which have addressed the question have reached the same answer, they have done so without any citation to this Court's decisions on construing the waiver of sovereign immunity in the FTCA. App. 3-4; *Joe v. United States*, 772 F.2d 1535 (11th Cir. 1985); *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986); *see also*, *Jackson*, 881 F.2d at 712 (*dictum*).

CONCLUSION

The Court should grant the petition for writ of certiorari.

DATED: January 5, 1998.

Respectfully submitted,

Abraham A. Arditi
Attorney for Petitioners

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACI ANDERSON; CYNTHIA IRONS, *Plaintiffs-Appellees,*	)
and	) No. 96-35768
VITRO CORPORATION, for a Limited Purpose,	) D.C. No.) CV-94-05458-RJB
v.	) OPINION
UNITED STATES OF AMERICA, *Defendant-Appellant.*	)

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
October 10, 1997--Seattle, Washington

Filed November 4, 1997

Before: Otto R. Skopil, Jr. and
Stephen S. Trott, Circuit Judges, and
John McCarthy Roll, District Judge.*

Opinion by Judge Trott

COUNSEL

Stephanie R. Marcus, United States Department of Justice, Washington, D.C., for the defendant-appellant.

Abraham A. Arditi, Seattle, Washington, for the plaintiffs-appellees.

OPINION

TROTT, Circuit Judge:

OVERVIEW

Plaintiffs Traci Anderson and Cynthia Irons filed an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 (1994), alleging the government was liable for, inter alia, negligent supervision and sexual harassment based

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* The Honorable John McCarthy Roll, United States District Judge for the District of Arizona, sitting by designation.

on a Washington state civil rights statute. Wash. Rev. Code (RCW) § 49.60.030 (Supp. 1996-1997). The court entered a judgment awarding compensatory damages. It issued a separate award covering attorneys' fees and expenses. The district court reasoned that because the state statute authorizes an award of attorneys' fees and expenses against private parties, the government should likewise be liable for such fees and expenses. This court reverses and remands to vacate judgment only to the extent that it grants an award of attorneys' fees and expenses against the United States.

STANDARD OF REVIEW

This court reviews de novo the issue of sovereign immunity for the purposes of recovering attorneys' fees under the FTCA. *E.J. Friedman Co. v. United States*, 6 F.3d 1355, 1357 (9th Cir. 1993).

DISCUSSION

[1] The FTCA does not contain an express waiver of sovereign immunity for attorneys' fees and expenses. We adopt the reasoning and holding of *Joe v. United States*, in which the Eleventh Circuit found that sovereign immunity bars an award of attorneys' fees against the United States unless a statute expressly authorizes such an award. 772 F.2d 1535, 1536 (11th Cir. 1985) (per curiam).

[2] There is no mention of waiver of sovereign immunity in the only section of the FTCA that mentions attorneys' fees. Such a waiver will not be inferred The FTCA refers to attorneys' fees only once, in a provision that limits the amount an attorney can recover in a contingency fee arrangement to twenty-five percent of the total damage award. 28 U.S.C. § 2678 (1994). This provision and its legislative history indicate that Congress viewed FTCA claims as typically involving contingency fee arrangements, not recovery from the government. *See Joe*, 772 F.2d at 1537.

[3] A state statute that permits the recovery of attorneys' fees does not entitle prevailing parties to a fee award against the United States under the FTCA. *Johnson v. United States*, 780 F.2d 902, 910 (11th Cir. 1986). This court, citing both *Joe* and *Johnson*, has reiterated that a waiver of sovereign immunity in the FTCA "is to be construed narrowly so that the government is never held liable for a plaintiff's attorney fees, even if the local substantive law permits recovery of fees against a private individual in like circumstances." *Jackson v. United States*, 881 F.2d 707, 712 (9th Cir. 1989).

[4] Congress has not waived the government's sovereign immunity for attorneys' fees and expenses under the FTCA. The district court therefore erred when it found the government liable for plaintiffs' attorneys' fees and costs. We reverse and remand to

vacate judgment on fees and costs. The district court's award of compensatory damages, not the subject of this appeal, remains undisturbed.

REVERSED and REMANDED.

HON. ROBERT J. BRYAN

Filed June 14, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TRACI ANDERSON and CYNTHIA IRONS,	)	
Plaintiffs,	)	NO. C94-5458RJB
v.	)	
UNITED STATES OF AMERICA,	)	CORRECTED FINAL JUDGMENT IN CIVIL CASE PURSUANT TO RULE 54(B)
Defendant	)	
and	)	
VITRO CORPORATION,	)	
Intervenor for a Limited Purpose.	)	

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Court finds FOR the plaintiffs as follows:

Special damages for Traci Anderson in the amount of $19,396.80.

Compensatory damages for Traci Anderson in the amount of $150,000.00.

Total damages for Traci Anderson in the amount of $169,396.80.

Special damages for Cynthia Irons in the amount of $7,293.60.

Compensatory damages for Cynthia Irons in the amount of $150,000.00.

Total damages for Cynthia Irons in the amount of $157,293.60.

Plaintiff Traci Anderson is awarded judgment against defendant USA in the amount of $139,752.36.

Plaintiff Cynthia Irons is awarded judgment against defendant USA in the amount of $129,767.22.

Plaintiffs' Motion for Attorneys Fees and Expenses is GRANTED.

Plaintiffs are AWARDED Judgment against the United States of America in the amount of $63,068.40 in attorneys fees and $9,873.21 in expenses.

6/14/96 BRUCE RIFKIN
Date Clerk
/s/Janet R. Thornton
(By) Deputy Clerk

Filed January 16, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TRACI ANDERSON and CYNTHIA IRONS, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	) CASE NO. C94-5458 RJB) ORDER DENYING) DEFENDANT'S) MOTION TO AMEND) FINDINGS OF FACT) AND CONCLUSIONS) OF LAW

THIS MATTER comes before the court on Defendant United States of America's Motion to Amend the Findings of Fact and Conclusions of Law. The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

The court entered oral findings of fact and conclusions of law in favor of the plaintiffs, following a four day trial. Plaintiffs alleged claims of sexual harassment prohibited by Washington state law, RCW 49.60.030. That statute provides, in pertinent part:

> (2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a

> court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or by Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 *et seq.*).

The court awarded damages and attorneys' fees, as directed by RCW 49.60.030.

The government now argues that the waiver of sovereign immunity stated in the Federal Torts Claims Act, 28 U.S.C. Sec. 2674 does not extend to separate awards of attorneys' fees. The government relies on 28 U.S.C. Sec. 2678 to contend that any attorney fee to be paid plaintiffs' counsel must come from the amount of the judgment entered in favor of the plaintiffs.

The plaintiffs argue that 28 U.S.C. Sec. 2674 allows the government to be found liable "in the same manner and to the same extent as a private individual under like circumstance." The plaintiffs contend that the only exceptions stated in the statute are prejudgment interest and punitive damages. If fees were also excepted, the statute would have said so. The plaintiffs rely on authorities which hold that the Federal Tort Claims Act waives governmental immunity from

suit in "sweeping language" and any exceptions must be narrowly construed. *See, United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951).

The court has carefully reviewed the authorities presented on both sides of this issue. The Federal Torts Claims Act, 28 U.S.C. Sec. 2674, clearly states that the government shall be liable as if it were a private individual in like circumstances. This case presented particularly egregious acts of sexual harassment and retaliation, and the government was in violation of RCW 49.60.030, which prohibits sexual harassment and retaliation in the work place. If the government were a private person in violation of RCW 49.60.030, it would clearly be liable for the plaintiffs' attorneys fees. The plaintiffs will not be made whole for the wrongs suffered at the hands of the United States if they are forced to deduct their attorney's fees from their actual damages.

The cases cited by the government are distinguishable on their facts. Those cases pertain to conflicting federal and state laws regarding the validity of private contingency fee agreements. *See, Jackson v. U.S.*, 881 F.2d 707 (9th Cir. 1989). That is not the issue here. For the reasons stated by the plaintiffs, the government's motion to amend should be denied.

Therefore, it is hereby

ORDERED that Defendant United States of America's Motion to Amend the Findings of Fact and Conclusions of Law is **DENIED.**

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 12 day of Jan., 1996

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TRACI ANDERSON and CYNTHIA IRONS,	) Docket No. C94-5458RJB
Plaintiffs,	)
v.	) Tacoma, Washington
	) December 15, 1995
UNITED STATES OF AMERICA,	) 3:00 p.m.
Defendant.	)

TRANSCRIPT OF COURT'S ORAL DECISION
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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Court Reporter: Julaine V. Ryen
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Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

THE COURT: Well, I finished this about 20 minutes ago so our timing was okay.

I should explain first that I must make findings of fact and conclusions of law in coming to a decision, and explain the reasons for my rulings. This takes a lot of time, unfortunately. I don't know any other way to do it, although I have adopted a couple of shortcuts here. But I hope you will be patient with me while I wander through the facts and the law in this case.

I want to first tell you, primarily for the benefit of the plaintiffs, how cases like this are decided. We have no jury, which means I must determine the facts in the case from the evidence produced in court. To those facts, I must determine what law applies and then apply the law to those facts and in that way decide the case. This is a matter of determining facts and law, applying one to the other. That leads to a decision. This is not a situation where I decide who I think ought to win and then try and justify it. It doesn't work that way. The law and the facts lead to a conclusion.

Now, in a case like this, the plaintiffs have the burden of proof, and they must prove each element of each claim that they assert. The burden of proof in a civil case such as this is by a preponderance of the evidence, and that simply means that I must decide from the evidence what is more probably true than not true on any issues that are contested. That's the way that facts are determined. That means, since the plaintiffs have the burden of proof, that if in some instance the proof is evenly balanced, the plaintiffs would lose that point.

In determining the facts, I have to sometimes decide the credibility of witnesses. That is, how believable witnesses are in their testimony. I'm sure that you can see from that brief explanation that there is nothing magic about this -- that I'm human and have the same human frailties that other humans have. This is not an exact science, but it is an exercise in how well the human mind works, I guess.

I want to say preliminarily here that so far as credibility is concerned, I found both plaintiffs to be credible witnesses in all respects, and generally I was satisfied with the credibility of most all the witnesses. There really are not a lot of facts in issue in this case. It's more a question of interpretation of those facts and application of the law.

I also want to say that the people that we have been beating up the most in this trial are not here to

defend themselves -- Mr. Goddard, particularly, and also Mr. Cole, who are also parties to this case. I must make findings based on the evidence before me now. If we have a second trial involving one or both of those individuals, I must, after that trial, reassess whatever I say here today in light of whatever they tell me to determine whether the facts with other evidence before me might be different than they appear to be today. So I am mindful that many of these things that are not contested, much of the evidence in this case that is not here contested, could be contested in a later circumstance that could lead to different conclusions.

Before I launch into findings, I want to make some general observations about discrimination law in this country, in particular sex discrimination law, as it has built up in the last not very many years.

I guess I was a little surprised at Mr. Kent, who in one breath said that he had a definition of harassment, that you shouldn't do or say anything that is offensive to someone else in the workplace, which is what this is all about, and then on the other he said he was confused by the messages he got in his training.

Mr. Pinnell, in his argument, talked about this work group being like a family. Working groups are like a family in many ways, but, you know, families operate in a lot of ways. Some are functional and some are dysfunctional, and in this circumstance, this was like a dysfunctional family. What these laws are all

about, as applied to sex discrimination, is, in my view, very simple. What the laws have said is that in the workplace, women have a right to be treated as men would like to have their mother, their spouse, or their daughter treated. They have a right not to be treated by men in the workplace as though they were a prostitute on the street where someone is paying for the right to, if it is a right, for the opportunity to abuse them. This is like a slight twist on the golden rule. We test in federal discrimination cases the offensiveness of conduct based on a reasonable woman standard in sex discrimination cases. I think, although that phrase was adopted by Judge Beezer in the Ninth Circuit case, I think that it is no different than the negligence standards that we deal with in this state, or any other legal standard, because the standards are measured against a reasonable person under the same or similar circumstances. When we are talking about sex discrimination by men against women, the reasonableness standard under the same or similar circumstances has to take into account the circumstances of the sex of the people involved. What is reasonable to a woman in the workplace is not necessarily reasonable to a man, and vice versa. The law recognizes that difference, whether you just say under the typical similar circumstances standard or under the reasonable woman standard that the circuit has adopted in discrimination cases.

Now, all of that is sort of preliminary observations. I want to also warn you, I guess, that I

can't cover -- or I won't cover every possible fact that has been testified to in this case and maybe not every twist on the law that has been testified to here, but I will try to cover the important points.

By making oral findings and conclusions in this way under the rules, it makes it unnecessary to have formal findings and conclusions prepared and executed and filed separately. If anyone wants these things in writing or if the circuit would want them, they are on the record and easy to get a transcript of.

Let me now address findings of fact, particularly.

First, I would adopt those facts admitted in the pretrial order as the findings of this court.

Second -- and this is a little unusual, but I do it purposely, not only to save time but because it's accurate -- I would adopt as my findings of fact plaintiffs' counsel's summary in the first part of his closing argument regarding Mr. Goddard's work history and discipline history at Keyport, with one exception, and that is that I am not critical of the discipline that Mr. Goddard received. That recitation that was made, I think succinctly and well by Mr. Arditi in regard to Mr. Goddard's work history and discipline history, is certainly corroborated by the exhibits in the file. From that history, I reach a conclusory fact, if you will, and that is that Mr. Goddard was known to the United

States Navy and its managers as a sexist, as a bully, as a retaliator, and as an employee that in the exercise of ordinary care by an employer required close supervision if he was to be allowed at all to supervise others in the workplace. That fact was known to the Navy before either Ms. Anderson or Ms. Irons became associated with Mr. Goddard in the workplace.

I am also going to adopt as my findings of fact Mr. Arditi's summary in closing argument, in the second part of his closing argument, regarding the harassing conduct of Mr. Goddard, Mr. Cole, and others up to July of '93, up to the complaint to EEO in July of '93. There is one exception to that, however, that I don't buy into, and that is in regard to Mr. Ray's statement made to Ms. Irons about his view of women in the workplace. I don't think that was discriminatory. I think that was a discussion among people where he exercised his right to say what he thought about it, and it did not appear to me to be particularly harassing, or to be harassing at all, to Ms. Irons. It was only a statement of a view made in a non-threatening manner.

Now, for purposes of the record, what I have adopted is facts recited by Mr. Arditi that are supported by the evidence and were recited in his argument, up to the start of his discussion of RCW 5.40.050. From those findings -- and really, there's no major issues of fact about those findings of what went on in the workplace, but I draw some conclusory facts from them regarding sexual harassment. The conclusion is this:

From the time of their employment, both plaintiffs were subjected to frequent sexually suggestive and sexually inappropriate comments and jokes directed both at them and at others, but in their presence. Before January of 1993, speaking in terms of employment law, the inappropriate and incessant sexually oriented comments and jokes ripened into a pervasive hostile work environment for the plaintiffs. That is, the words and conduct were sufficiently severe and pervasive so as to alter the terms and conditions of their employment. The evidence indicates that it reached that stage before January of 1993.

This environment was not only what's known as a hostile work environment to the plaintiffs, but also to others in their group -- in particular, Mr. Brown, who found the activities of others in the work group offensive. That hostile work environment continued, based on sexual discrimination or sexual harassment, as described in the evidence and in these findings, at least up to the filing of the EEO complaint in July of 1993. At that point, I think the nature of the problem changed, and we will come to that.

In argument -- I want to point something out -- Mr. Pinnell said that Mr. Goddard's activities in this regard and others were sexist, tasteless, and adolescent behavior. I don't argue with that characterization, except in one way. It was sexist and tasteless, but it was not delivered by an adolescent. It was delivered by a grown-up man, and men, and they were not silly

adolescents that one might excuse or might not take seriously because of their youth. So they may have acted like adolescents, but they weren't adolescents, and they can't seize on that as any sort of an excuse.

Now, there are some other facts that go along with what I have just discussed here about sexual harassment in the workplace and hostile work environment and Mr. Goddard's history in regard to the period between the employment of Ms. Anderson and Ms. Irons and the time that they filed an EEO complaint, or went to EEO.

First, Mr. Goddard was the leader of the work group. He acted as a supervisor on behalf of the government, and he was the primary harasser. His actions in the group encouraged others to join in the inappropriate behavior and encouraged others to participate in making the working environment a hostile one.

Second, Mr. Goddard not only engaged in sexual comments and jokes, but he also was able to disseminate an image, which the plaintiffs reasonably believed to be true, of intolerance of taking group information outside of the group, of the image that he was sometimes armed, that he fought, that he was macho, and that he had a dangerous -- well, that he had little temper control and basically he was a dangerous person. That was the image that he presented in the workplace to these women. Maybe he thought that was

a good image, but it was an unfortunate one.

He projected the image that he had management, including the EEO officer, in his hip pocket. That is, that any complaints to management about Goddard would fall on deaf ears, and he would be able weather the storm if any complaints were made about him because of his friendships. He projected the image that he could get people that got in his way and that he would do so. He projected the image that he controlled the Vitro contract and work that contractors might do in his work group.

All of those facts are supported by the evidence of events occurring both before and after the EEO complaint was filed in July of 1993. That includes Mr. Fish's testimony about why he made an anonymous complaint. It includes Mr. Brown's testimony. It includes Mr. Behm's testimony about getting a complaint and, for whatever reason, advising these ladies that if they made the complaint it might affect their job status and the contract status.

It's hard to understand some of these things when you are a judge and everybody does what you say, at least usually, but people were afraid of him. It's hard to understand when you sit in my position why anybody would be afraid of a guy like that. But he was able to project an image that caused fear in other people in the workplace. That was an image that was reasonable believed and accepted by these plaintiffs.

A third issue, and finding, is that Mr. Goddard, in spite of his disciplinary history, was not supervised in his relationship with members of his work group. As we see in Exhibit 11 at page 4, Mr. Kent told Mr. Goddard's direct boss, Ms. Vucovich, that Goddard knew what he was doing and that she should adopt a hands-off attitude in regard to supervising him. The evidence indicates that no one supervised his supervision of his work group, although his record cried out a warning that this man was potentially dangerous to subordinates and should be closely supervised, if allowed to supervise others at all.

The evidence indicates here that Mr. Goddard, as evidenced not only by his actions, but as corroborated by his appearance on the television show, which is Exhibit 26 in this case, Mr. Goddard was one of those men, who I like to think are in the minority, but he was one of those men who "just don't get it." His performance on that TV show corroborated everything else that was said about him by the plaintiffs. It comes after the fact, but it is still corroborative evidence. It showed his lack of sensitivity to others; it showed an extreme egoism that was apparent. Those things should have been apparent to the Navy before plaintiffs ever came to work in his work group. They had plenty of warning. And certainly, that TV show corroborated the accuracy of the warnings that were in his file.

The next thing, the fifth thing, I guess, I want to address in regard to facts are the plaintiffs themselves as employees. The record is clear in this case that the plaintiffs were outstanding employees. The quality of their work was never fairly questioned, the quality of their character was never fairly questioned, and they became, as we will see here, victims in all this. They not only did nothing wrong, but when it came down to it, they did most everything right. Instead of the victimization that they suffered, the Navy should be holding them up as examples of what good employees or contract employees should be, how they should conduct themselves, and how they should speak out about inappropriate activity in the workplace.

Now, they did make complaints, even though they were concerned about what would happen if they made complaints. We know that there was a complaint made in January by them to their own boss, which was the appropriate step, and Mr. Behm got the word. Then later, Mr. Ray -- no, Mr. Fish filed -- was it Mr. Fish who filed an anonymous one? -- I have people mixed up; we have a lot of players -- filed the anonymous complaint. Other complaints were made. None of these complaints about the treatment of these ladies in the workplace was successful, and let's talk about who failed here.

Mr. Brown failed, although he tried, to his credit, and he suffered for it -- and I hope the Navy does something about that, because certainly Mr.

Brown should be also given an award for his willingness to come forward and report wrongdoing in the workplace, and he suffered for it. He shouldn't have, but his efforts failed. Even though it wasn't necessarily his job to do it as a coworker. Mr. Logue failed these plaintiffs. Mr. Behm failed them. Ray failed them. Martin failed them. Jensen and Blakely failed them. Sikes failed them. Kent failed them. Others in the work group failed them.

Who had the duty to protect them, to help them? Behm did, and Vitro, and they failed. Mr. Ray, I think, did. Jensen and Blakely did. Kent did. All the supervision above Kent did and that chain of command, and they failed to see what was there. They failed to supervise. They did not put themselves in a position to observe the workplace, even though they had notice that there would likely be continuing problems with Mr. Goddard's supervision. There were a lot of efforts made, but no one made a successful effort to resolve this harassment problem until the EEO complaint was actually filed.

Now, I could talk a lot more specifically about how everybody failed, even the ones that tried, but I don't think I need to go into that in any detail, except I should address, perhaps, the anonymous report and the EEO office's reaction to that report.

That report told management a great deal. It warned against retaliation. It was clear that these ladies

might feel under some danger or limitation or subject to some adverse action if they spoke out. Exhibit 1 suggests to me quite clearly that the EEO office had an obligation to examine into such things. And, you know, Ms. Jensen, I don't have any ill feeling toward her, but she simply made a bad error in this, in dealing with that anonymous complaint. She didn't inquire about it in a forum when the alleged victims might have been comfortable to talk to her. She didn't talk with their supervisors. The single inquiry to Ms. Irons in the workplace was simply not a sufficient or reasonable response to that claim, particularly when the Navy, even though Ms. Jensen may not have known it, but the Navy was on notice of Mr. Goddard's propensity.

There is another claim here that the harm alleged by the plaintiffs was out of proportion to the cause, and I've been talking thus far about what I would call the harassment phase of this case, not the retaliation phase. I would note that during the harassment phase that went on from the time of their employment until July of 1993, that these plaintiffs were uncomfortable and stressed, but they were not yet medically challenged by what was going on in the workplace, at least not in the serious way that occurred later. But they were uncomfortable and stressed by the hostile work environment that they found themselves in, and that stress level got worse as time went on and up til the time the EEO complaint was made, but their reaction and distress was comparatively minor during that period of time and was proportionate to what was

happening to them in the workplace before they filed the EEO complaint.

I should also note that I think both Ms. Anderson and Ms. Irons were sitting ducks in this situation. They were young, and from their own background and circumstances in life, I think they were more subject to be badly harmed by this sort of a hostile work environment than others might be, and they were more likely to be harmed by the retaliation that followed than some other people might be. But as we discussed during argument, you take your plaintiffs as you find them, and if they were susceptible to injury and as a result were more injured than other people might have been, that does not lessen responsibility for those injuries.

I want to discuss also whether that sexual harassment was within the scope of the employment of the harassers and the victims. It most all occurred in the workplace. It most all was directly contrary to the rules of the workplace as adopted by the United States Navy and the United States of America, as is reflected in Exhibit 1 and the references in the first paragraph of Exhibit 1 to other documents. The activities in the workplace, even if they started out as individual minor things, they soon ripened into an environment that was the employment, and it was the employment environment. Management should have supervised that. They should have known what was going on under all the circumstances presented here.

It's arguable that some components of that harassing conduct were outside the scope of employment. I really don't think they were, but it is certainly arguable. For example, Mr. Cole picked up in a hug and twirled Ms. Anderson around. It happened on one occasion. Obviously, that wasn't something that the Navy was going to think was going to happen and could jump in there and say "Stop" before he did it. So you could argue that was outside the scope of employment. Mr. Goddard asking for dates once or twice early in the relationship you can argue is outside of his scope of employment and contrary to the rules of his employment and Exhibit 1, the instructions of the commander. The threatening calls after the EEO complaint was made, particularly to Ms. Irons, you could argue was a folly of his and not within the scope of the employment. But I want to point out that individually those events are isolated and de minimis in the scope of this whole scenario here when compared to the overall harassment and hostile work environment and the retaliation that followed. In other words, if those three events had not happened, we would be in the same place we are now, even without them. So, you know, whether they were within or without the scope of employment really doesn't make much difference here.

But, you see, I think they are within the scope of employment because it was the employment atmosphere created primarily by Mr. Goddard, but others in the work group, that set the stage for a hug

and twirl inappropriately. It was the work environment and Mr. Goddard's sorry history that enabled him to make these ladies feel uncomfortable from the first time he asked them to go out with him, and it was the work environment that allowed him to continue in that vein.

It was the work environment that allowed him to repeat threatening calls to someone that turned him down or that he was unhappy with. And in that regard, I want to say that based on a preponderance of the evidence, the probabilities are high that those calls made to Ms. Irons after the EEO complaint was filed came from Mr. Goddard. He has a history of it. The Navy didn't do anything about it that was strong enough to prevent him from doing it again, and he is simply the most likely candidate for those anonymous calls. But, you see, Ms. Irons was exposed to that in part by the Navy because they were aware of that propensity on the part of Mr. Goddard through the circumstances of Ms. Orr, and they knew of his behavior towards subordinates, and they did not effectively deal with it.

So, in any event, it's my conclusion that everything I have heard here about harassment in the workplace is within the employment arena or is part of a hostile work environment. Those actions were foreseeable by management, and management knew, or should have known, of the hostile work environment created by Mr. Goddard and others.

The issues in at least one case are whether the employee was at the time engaged in the performance of the duties required of him by his contract of employment. Most of this went on while Mr. Goddard and others were engaged in the performance of their general duties; and second, or alternatively, he was engaged at the time in the furtherance of his employer's interests, or purported to be, while he was conducting himself in the workplace in creating this hostile environment for these ladies.

As I have indicated, management -- and we have many levels of management -- but management participated in some of the harassment and the retaliation, which we will talk about in a few minutes, and they knew, or should have known, of the harassment and retaliation. They failed to take any prompt remedial action that was in any way remedial or effective, even though they made some attempts.

The next issue I want to address is whether plaintiffs should have complained earlier. It's easy to say yes. Those of us men in the workplace that work with women are afraid that we will cause offense by some of our coarse conduct, and if we do, most of us hope that the first thing that will happen is that any woman offended will come right to us and say, you know, "Judge, I wish you wouldn't tell jokes like that. It offends me." Then I know, and I say, "I'm sorry. I won't do it again," and then the problem is over for both of us. I mean, that's how men, I hope, that are

reasonably sensitive, but make mistakes, deal with this problem we are discussing.

So it's easy to say they should have complained, but they can't be blamed -- Ms. Anderson and Ms. Irons in this circumstance can't be blamed for not complaining more. They did complain and were told that they were in a catch 22 by their own boss and basically told not to complain, to live with it. Others complained in their behalf, and it did no good. When they did complain, finally, formally in July, their worst fears were realized, and the concerns that prevented them from complaining and coming forward before turned out to be true when they, in fact, came and complained. It turned out to be true in the form of a vicious retaliation by many people.

Experience with abuse -- and, I guess, after years and years as a superior court judge I'm more familiar with domestic abuse than abuse in the workplace, although I have been dealing with a lot of that in the last ten years -- but it is very common for women to live in the worst kind of abuse and never come forward and complain to the various agencies that are available to help them. Physical abuse, sexual abuse, psychological abuse. It happens all the time. It's one of the difficult to explain phenomena about abuse, not only in the family, but in the workplace, and we simply cannot lay the blame on victims in such circumstances.

I don't know if you all caught this, but this was telling testimony to me from Ms. Anderson and Ms. Irons, about the terrible feeling of powerlessness that they had in this circumstance. Those of us, Ms. Anderson and Ms. Irons, that are aggressive -- not only males, but a lot of males are aggressive and confident -- and we have power and we feel our power. What is difficult for us to feel, what was difficult for many of the men in this workplace to understand, is the powerlessness that victims of abuse, whether it be sexual harassment or physical abuse, feel, and it is common, and they can't be blamed, in my view, because they did no more than they did in the way of complaint.

Now, as you can see from this discussion that I am engaged in here, the evidence leads me to the conclusion that there were two distinct phases to this case. I have been talking mostly here about the harassment phase. The second phase is what happened after the complaint to EEO is made, the retaliation phase.

It appears clear to me from the evidence that the plaintiffs suffered a lot more after they complained to EEO than they did before then. This retaliation phase really started with the Naval Investigative Service inquiry made to Ms. Irons. I don't know if Mr. Goddard had a guilty feeling about that or what, but it was not his business. He was agitated about it. Ms. Irons was told it was confidential. She properly chose

not to discuss it with him. I'm sure she showed her irritation to him when he insisted on learning about it, but it was not his business, and Mr. Goddard lied about that to Ms. Irons. He lied that the command wanted to know about that -- or security did or somebody. Then he got mad at her, lost his temper on the phone, totally inappropriately, in retaliation for her doing what was right, because either she did it or he didn't like the way she did it. Then he lied about the workload in the office in order to try to get rid of her. Retaliation for acting properly, maybe not sexual, but tied into the whole problem of sexual abuse and the problem of taking advantage of people that don't have power that are under your supervision. In this case, women who felt powerless.

At that point, Mr. Behm and Vitro went along with this lie and went along with this discrimination, with this retaliation for doing the right thing. But these ladies finally determined that they had to stand up for themselves and went to Mr. Williams, and with the help of Mr. Williams, they saved Ms. Irons' job. But that all started the EEO complaint. That started with the removal of Ms. Irons, and then even though she got her job back, the situation immediately worsened in the workplace when the EEO complaint was filed and started to be investigated.

The hostile work environment, based on the evidence I heard, became more hostile at that point. EEO finally did its job, starting as -- well, I don't have

to refer to the exhibit -- but starting on the date that Ms. Jensen started her investigation. The Navy did its job, and they investigated and disciplined Mr. Goddard. At that point, the Navy management, the commander and the EEO and management, from the top down to the shop, were aware of the hostility that the plaintiffs were facing in the workplace because of their complaint about sexual harassment. They should have known before, but certainly they did know about this hostility after, at the time of and after that EEO complaint was processed and the investigation was done.

So the Navy was then aware of the hostility that plaintiffs were facing in the workplace and they simply did not -- I guess it's not the Navy -- the Navy, it did not take steps to eliminate the hostility from the workplace, and by taking inadequate steps, or by inaction, they allowed the naval base to retaliate against these ladies for doing the right thing.

The Navy knew at that point what was going on in the workplace. They hired a counselor. They had some meetings. They were aware that those things were not successful and that these ladies were still suffering in the workplace. They continued to report to EEO. They continued to report to the CO. The retaliation by co-workers and managers continued, and no one found the strength or ability to put a stop to it.

Ms. Irons was threatened by calls from Mr. Goddard, and both were threatened by looks and stares from him and from other co-workers. They were shunned and ostracized by their co-workers, including management, including Mr. Kent, who testified if he had had any idea what this was all about he would have acted differently toward them. They were generally shunned and ostracized by employees generally at the base, and they were referred to by inappropriate names and discussions on the base. The ostracism was so severe that both plaintiffs suffered form physical illnesses that were triggered by the hostility in the workplace.

Now, the Navy, and through its managers and EEO, made some weak and half-hearted attempts to reconcile the workplace. Those attempts were totally ineffective. While there is some, perhaps, conflict in the evidence on this, I am satisfied from the evidence that management at Keyport never made a meaningful effort to clarify the events to the work group, to management, or to other employees in the workplace. Ms. Jensen said they did do that, but I think Mr. Kent's testimony is more -- I believe it was Mr. Kent -- was more accurate on that when he said he didn't know what this was all about until he sat in court for a couple of days and heard the testimony. Of course, many people in the workplace thought these ladies had run Mr. Goddard off the job for no good reason because nobody told them otherwise. Certainly, the Navy had the responsibility to prevent a hostile work

environment from continuing around these two contract employees.

It's hard for me to believe that if after this hostility became apparent to EEO and others, when Mr. Goddard was removed, it's hard for me to believe that the leadership, the management, and the rank and file at Keyport would not have solidly been behind Ms. Irons and Ms. Anderson if only they had known what these ladies had suffered at the hands of their supervisor. But that simple step of clarifying the facts to those that were engaged in the hostility in the workplace was not done.

I think it's clear, also, from the evidence that the attempts that were made, while laudable, obviously failed, and there was no follow-up, no renewed effort, and the Keyport management clearly knew that those efforts were unsuccessful and did not do anything to change the horrible retaliation that these ladies were undergoing every day at work.

This is sort of a repeat, I guess, of what I said, but the result of this -- there were two results. One is that the vast majority of the people in the work force at Keyport, including management, shunned and ostracized these two ladies for no reason. If they had known what had gone on, I can't help but believe that they, the majority of the work force at Keyport, would have been praising them for their courage rather than ostracizing them from the workplace. It's hard to

believe that anyone who knew all the facts would not be proud of Ms. Anderson and Ms. Irons.

Now, the other things about this that tells me that there was really and truly horrible retaliation taking place in the work force and a horrible hostile working environment is the effects that these ladies suffered that they had not -- they may have been started back during the harassment days, but they really blossomed into major physical problems during the retaliation phase, when this hostility continued in the workplace. It's not until, I believe, September that both ladies went to see physicians and counselors about their physical conditions. It appears clear to me that the stress that brought those things on was directly related to the retaliation that they faced in the workplace because they did the right thing, but it was not recognized.

In regard to that, I want to be sure you understand that the evidence shows to me that management was not only aware of the shabby treatment that they were receiving and failed to prevent it and failed to take reasonable steps to prevent it -- the steps they took were obviously insufficient and not reasonable -- but many, many managers at Keyport participated in the shabby treatment, the shunning and ostracism that these ladies faced at work.

Well, the work environment was so bad that it essentially destroyed the health of both ladies for a

considerable period of time. It forced Ms. Anderson from the workplace. In employment law, I would call that a constructive discharge. It made not only their work lives, but their personal lives, living hell from July until they both terminated from federal employment. It provided, not only during that period, daily misery, but provided lingering physical and emotional damage that has continued to today and will continue in the future to some extent that we really can't prognosticate on, based on the evidence.

Now, I must turn my attention to what Ms. Anderson and Ms. Irons suffered as a result of this harassment and retaliation. I'm not going to here repeat everything. It's easier to simply say that the testimony of Drs. Lucas, Gilmore, and Rankin and social work counselors Wells and Trappey I would accept verbatim and absolutely as findings of fact in this case. None of it was challenged. They testified truthfully, and clearly indicated that the symptoms they testified about were caused by the hostile environment that these ladies were working in. The causation, in other words, is not challenged. That testimony, of course, is corroborated by the testimony of both Ms. Anderson and Ms. Irons in regard to how they felt at different times during this period, and that has not been challenged.

The symptoms that they suffered were not just subjective symptoms, they were illnesses that were objective and observable over a long period of time, including clinical depression. If you have ever been

around someone who is clinically depressed, it doesn't take a psychiatrist to diagnose that, although the psychiatrists and physicians did. Her tears are not subjective. And mood and effect are not subjective.

I would note, also, that the testimony from both plaintiffs is ultimately believable about the terrible powerless feelings they felt, the worthless feelings they felt, and the feeling that they had no one to turn to in whom they could, in confidence, ask for assistance. As I mentioned, they may have been more susceptible to this sort of damage and symptomatology than others, but you take plaintiffs as you find them.

Now, that's the factual background that we're dealing with here. I've been talking about those facts for an hour, and we must fit those facts now into legal principles to determine if this defendant, the United States, is liable to these plaintiffs under any of the theories here argued.

First, of course, we turn to the Federal Tort Claims Act. This is a Federal Tort Claim Act case under 28 United States Code Section 1346. It indicates that the United States should be liable for money damages for personal injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where

the act or omission occurred." So we're not just dealing with negligence, but with wrongful acts or omissions under state law.

The first claim is one of negligent supervision, and the claim is that the Navy failed to properly supervise the workplace and it's managers and supervisors, and that the failure to supervise proximately caused damages to these plaintiffs.

We first, in looking at that claim, have to look at the duty that the Navy had, the government had, in regard to supervising people in the workplace. As is indicated in RCW 5.40.050, a duty imposed by administrative rule "shall not be considered negligent per se, but may be considered by the trier of fact as evidence of negligence."

We have in this case a very powerful document that sets forth the Navy's own standards in these matters, and that's Exhibit 1. Exhibit 1 is not only the commander's order at Keyport, but also references other naval instructions -- Code of Federal Regulations, Civilian Personnel Instructions, the Revised Code of Washington, and other manuals and documents. The Navy recognizes the state statutes, and one only has to read Exhibit 1 once in order to see that the duties set forth thereunder were not met in this case.

There is a duty besides the one set forth in that, what I would say is equal to an administrative rule.

There is a common law ordinary duty to exercise reasonable care in supervising employees, and in this case, it was clear that the Navy had a duty, based on the knowledge they had about Mr. Goddard, to supervise his supervision of employees because they had notice of this same kind of mistreatment at his hand. Was that duty to supervise a supervisor breached?

It seems to me it clearly was. If it had been met, either he wouldn't have been supervising people -- wouldn't have been supervising women, or if he was, his conduct would have been carefully monitored, and the conduct of the workplace would be carefully monitored so that there would be prevention of harassment, and the harassment would not be able to ripen into a hostile work environment, and managers generally would be supervised so that they did not retaliate against people who made proper complaints.

Did that failure to supervise proximately cause damages?

I think it obviously did, and the damage resulted. I think the plaintiffs have made out a negligent supervision claim under state law.

A more shaky theory is a negligent infliction of emotional distress. While I think the plaintiffs have probably also made out a claim under that theory, it's not as strong as the negligence supervision claim.

But not only did the Navy have a duty to supervise, but they also had a duty to investigate complaints of employment discrimination. They had an obligation to learn what was there to be learned by reasonable investigation and supervision, and then to not allow a continuing hostile work environment to exist, either on the basis of harassment or retaliation. They either knew or should have known of what was going on in the workplace.

They breached their common law duties. The Navy in this case did not act as a reasonable supervisor either in actual supervision, nor did they act as a reasonable manager based on the information they had about Mr. Goddard in his prior activities. That failure to investigate and failure to know what was there to be known, that they should have known, allowed this harassment to ripen into a hostile work environment and allowed the retaliation to occur, and I think on this theory, allowing the retaliation to take place and continue is more serious than the harassment. But in any event, the Navy's failure in that regard is also a proximate cause of the damages to plaintiffs.

The third claim here is reckless or intentional infliction of emotional distress. This has been called the tort of outrage. Outrage means two things: One is the common understanding of what outrage means; the other is a legal definition of the tort of outrage, or the tort involved in reckless or intentional infliction of emotional distress. It requires extreme and outrageous

conduct in the legal sense, which is defined as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."

I am not satisfied that the Navy and it's managers in this case meet that legal definition of outrage. It's easy to say this is outrageous, but that's somewhat different than the legal definition. On that basis, I think that claim has not been made out and here fails.

The next claim is under RCW 49.60.030. Before we get to that, we must look at -- and this has to do also with proportionate fault, but we must look at the definition of fault found in the Revised Code of Washington, because that ties in with RCW 49.60 and ties in with the Federal Tort Claims Act. But fault in the statute includes "acts or omissions . . . that are in any measure negligent or reckless toward the person or property or the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk" -- and the important part -- "and unreasonable failure to avoid an injury. . . " In other words, it's a very broad definition of fault. Particularly in this statute, 4.22.015, they are speaking of the fault we have to compare, but it's fault in the broad sense that we must compare for proportionality purposes.

RCW 49.60 is to some extent a catch-all statute, but it sets forth a right that is consistent with federal law, and the state has adopted this not only in the employment circumstance, but generally, and the right is to be free from discrimination because of other things, sex, or disability, and that's recognized and declared to be a civil right. It includes, but is not limited to, the right to obtain and hold employment without discrimination. So the right to be free from discrimination because of sex is recognized as and declared to be a civil right in this state. It includes, in my view -- the statute says includes, but is not limited to right to obtain and hold employment without discrimination. But I think that inclusion and failure to limit means that there is also a right under RCW 49.60 to not only obtain and hold employment without discrimination, but to obtain and hold employment without retaliation for protected activities. But whether we need go that far or not, I'm not sure in this analysis.

It seems to me that these ladies suffered discrimination that affected their right to hold employment. That discrimination started out as sexual harassment, and slipped into retaliation for complaining about sexual harassment, and those wrongs are covered by the Federal Tort Claims Act as well as by RCW 49.60. Those were wrongful acts or omissions, which if this was a private person, that person would be liable to the claimants in accord with Washington State law, and Washington State law gives the plaintiffs the right

to sue on that basis, under the same statute in section 2.

So it's my judgment that the United States -- you know, I hate to say this. I am employed by the United States, too, and I have a good deal of pride in my government. But in this case, it's my judgment that the United States, through the Navy, and through the Navy's managers, deprived the plaintiffs of their civil right to be free from sex discrimination and holding employment and in their right to be free from retaliation for a protected activity. It was that failure and that deprivation and failure to protect them from that deprivation that proximately caused the damage that they here complain of.

Now, I think that comes squarely under the Federal Tort Claims Act. Mr. Pinnell has argued that for a different reason that that should be excluded from federal responsibility; employment. I simply don't agree with that. I see no exception for the United States from this sort of employment discrimination under state law, and therefore under the Federal Tort Claims Act.

Now, a part of that 49.60 analysis is sort of a separate claim under public policy. That statute does set forth public policy, and if it was violated under the public statute, it was violated under the common law as well, and there was a duty under public policy, a breach of that duty, and causation and damages.

One thing important about a finding that the government is liable under RCW 49.60, of course, is that that means that the plaintiffs are entitled to their costs and reasonable attorney's fees as well as their actual damages.

Let me next talk -- I will try and talk more quickly here. No, I won't talk more quickly. I will try to not digress.

Let me address the proportionate fault.

Anyway, what I have just said about the various claims are conclusions of law. I didn't announce that as I went into them, but those are my conclusions of law.

Also, a mixed question of fact and law is proportionate fault. I referred to the broad definition of fault that comes into play here, and RCW 4.22.070 says that "In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the [plaintiff's] damages," and apportion damages accordingly.

I considered here whether I should treat Mr. Goddard or Mr. Cole or anyone else as a separate entity for purposes of this proportionality examination. I have concluded that I should not, because I think essentially everything that occurred here was within the scope of employment and was properly imputed to the

employer because of knowledge, or what knowledge there should have been in the hands of the employer, and because a manager participated and other managers knew or should have known and failed to take prompt remedial action. Under that circumstance, I think that the only other person that is separate from the Navy, the only other actions that were separate from the Navy's responsibility is that of Vitro.

Vitro was these plaintiffs' primary employer. They had notice of these problems. They could have acted properly back in January of 1993, and certainly between June and July of 1993, but they either did not act or did not act appropriately, and they were at fault for the same reasons, in my view, that the Navy was at fault here, under the same analysis.

Probably, if Vitro had done the right thing, most of the harm here could have been prevented, although it is questionable what effect a proper response by Vitro might have had in the workplace. I mean, it's somewhat speculative to determine that question. Perhaps, as Mr. Behm feared, if he carried the plaintiffs' complaint forward, Vitro might have been outmaneuvered by Goddard and other managers. I don't know.

It seems to me, however, that Vitro certainly was at fault and failed in this matter, but it seems to me, also, that their failure was primarily in the area of the sexual harassment before the EEO complaint was

finally filed and they did not have much to do with the retaliation that occurred thereafter.

Now, I say retaliation. What I mean is, of course, not so much specific acts of retaliation, but the hostile work environment that continued and became exacerbated because that retaliation was allowed to fester and grow into a general hostile work environment.

Now, figuring proportions is guesswork at best, I suppose. We have to have some reasons for what we do. I was a little surprised when Mr. Arditi mentioned 15 percent, because, frankly, I had in my mind 15 to 20.

I have thought about this, and it seems to me that of the claims here, probably this is 65 percent a retaliation hostile work environment case and 35 percent sexual harassment hostile work environment case. Vitro is responsible for about half of the sexual harassment hostile work environment problem, and I come to 17-and-a-half percent proportion. I think that in fixing proportionate fault under 4.22.070, it's fair for me to make a finding that in applying that statute, the government was responsible to the extent of 82.5 percent and Vitro 17.5 percent.

Let me turn my attention now to damages, which I'm sure is what plaintiffs are most interested in.

I'm satisfied that it's appropriate to treat these ladies equally in regard to pain and suffering based on the medical testimony and their own testimony. They have suffered in different ways, but basically equally, each for 21 months in the workplace and for an unknown period of time thereafter and into the future.

I compute Ms. Anderson's lost wages, as requested, in the amount of $14,839.20, plus the additional months that she testified to that were not on the exhibit of $1,681.60, for a total wage loss of $16,520.80. I am giving her the benefit of the doubt in regard to some of the times when she was unemployed after she left Vitro and Keyport, but left work thereafter for a move or something of the kind, when she was out of work for a while.

On the other hand, there's another reason, however, that I gave her the benefit of the doubt on that, and that is that the testimony was that this job at Keyport was a particularly advantageous job financially for these ladies, and we really don't know what the long-term effect of losing that employment might be. I suspect, without knowing, that it will be a long time, if ever, that they ever get as good a job as they had at Keyport, although I may be wrong at that. But they lost a tremendous opportunity, not only wages, but opportunity for retirement and other benefits that is hard to come by in other employment.

So with those things in mind, I think it's fair to fix Ms. Anderson's wage loss to the total of $16,520.80. Her medicines and medical care total 2,876, for a total of what we can call special damages of $19,396.80.

As to Ms. Irons, pursuant to the exhibit, she lost wages of $3,781.60 and had medical and counseling expenses of $3,512, for a total of $7,293.60, is what we can loosely call special damages.

Pain and suffering, disability, personal injury, illness is difficult. Not only did they lose their jobs, which we have talked about here, but they -- and that's really not part of pain and suffering here, but they lost opportunity. For some 21 months apiece in the workplace, their lives were -- I mean, it's like losing 21 months under these circumstances. They suffered from severe physical and emotional illnesses, as described by their physicians, including depression and what goes along with that, feelings of worthlessness and powerlessness, lack of control over their own lives. Their symptoms are ongoing to some extent, not just from the litigation, but their -- I would say they may have been slightly exacerbated by their attempts to seek justice, and I think it's not fair to penalize them for doing that. It's not over yet. We don't know how their mental health will be in the future or how their physical health will be or what connection there might be to this case. It may never be totally over for them, but one would hope that it would fade into a bad

memory within a short time.

It's important that any damages I fix not be punitive. Not only does the law says you should not impose punitive damages against the government, but the plaintiffs are not entitled to any more than compensatory damages under the law, and that's all that they should get.

But I do view this as a serious loss to them that included a great deal of pain and suffering, both mental and physical. It's my judgment that each plaintiff should be awarded $150,000 in compensatory damages for what they suffered that was caused by the acts or omissions I have already addressed.

Those two figures of special damages, so-called, and pain and suffering, so-called, should be reduced by seventeen-and-a-half percent, which according to my math means that Ms. Anderson is entitled to judgment of $139,752.36. Ms. Irons is entitled to judgment of $129,767.22. They are entitled to not only their costs, but a reasonable attorney's fee under RCW 49.60.

I would ask that the request for fees be handled as a motion, Mr. Arditi, with request for fees or motion for fees noted up to give the government a chance to respond to that and reply in accord with the local rules of the court regarding motions.

I want you to do that -- the clerk will enter judgment now, based on the findings of fact and conclusions of law here orally made, and judgment, that the plaintiffs are also entitled to costs and fees, reasonable fees, but I want to put a deadline on you to make that motion. So you tell me when you are going to file that motion, and then I will tell you you are going to have to file it by then.

MR. ARDITI: I think I can do it in 14 days, Your Honor.

THE COURT: That's fair enough. Let me ask you to file a motion by the -- what day is that, two Fridays from now?

THE CLERK: 29th.

THE COURT: The 29th of December. Note it up in accordance with the rules, and that will give defendants ample time to respond to that. Also during that period it gives both sides ample time to call to the court's attention any errors that I may have made in this ruling.

MR. ARDITI: Thank you, Your Honor.

THE COURT: I might say, counsel -- I was going to say I enjoyed trying this case. I like to hold court. I like to try cases. I hate to get involved in something that is as sad as this has been and as

difficult, I'm sure, as it's been for the government, who, after all, ends up bearing responsibility for what some people did that really don't represent the United States of America or the United States Navy, really, they just happen to work for them. But both of you have been most courteous, not only to me, but to each other throughout. You have presented your cases well. I'm sure Mr. Pinnell feels on the wrong end of this to some extent, but I felt that you fairly submitted the issues, factual and legal, that should have been submitted to the court, and in a fair way, and I just -- I guess I feel good about the legal work done in this case and I appreciate it.

MR. ARDITI: Thank you.

(Recessed at 4:35 P.M.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

JULAINE V. RYEN Date

Supreme Court, U.S.
FILED
MAR 18 1998
CLERK

No. 97-1191

In the Supreme Court of the United States

OCTOBER TERM, 1997

TRACI ANDERSON AND CYNTHIA IRONS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Tort Claims Act waives sovereign immunity for an award of attorneys' fees and expenses against the United States.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 127 F.3d 1190. The order (Pet. App. 9-12) and oral decision (Pet. App. 13-53) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1997. The petition for a writ of certiorari was filed on January 16, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Traci Anderson and Cynthia Irons filed this Federal Tort Claims Act (FTCA) action against the United States alleging that the govern-

ment was liable for negligent supervision of its employees, negligent infliction of emotional distress, intentional or reckless infliction of emotional distress, and sexual harassment and retaliation. See Pet. App. 2-3, 40-45.

The district court concluded that the government was liable for negligent supervision and sexual harassment. Pet. App. 40-45. The court based the government's liability for sexual harassment on a Washington state civil rights statute, Wash. Rev. Code § 49.60.030 (1994). Pet. App. 43-45. Because Section 49.60.030 authorizes awards of attorneys' fees and expenses against private parties, the district court concluded that the United States should likewise be liable for such fees and expenses. *Id.* at 11, 46, 51. The court thus entered judgment awarding damages and attorneys' fees and expenses against the United States. *Id.* at 8. On appeal, the United States challenged only the district court's award of attorneys' fees and expenses.

2. On November 4, 1997, the court of appeals reversed. Pet. App. 1-5. The court adopted the holding of *Joe* v. *United States*, 772 F.2d 1535 (11th Cir. 1985), in which the Eleventh Circuit ruled that the FTCA does not waive the United States' sovereign immunity for attorneys' fees, even when the state statute underlying the government's substantive liability authorizes fees against private parties. Pet. App. 3 (citing *Joe*, 772 F.2d at 1536). As the court of appeals explained, "[t]he FTCA refers to attorneys' fees only once, in a provision that limits the amount an attorney can recover in a contingency fee arrangement to twenty-five percent of the total damage award." *Id.* at 4 (citing 28 U.S.C. 2678). Because the FTCA does not contain an express waiver of sov-

ereign immunity for attorneys' fees and expenses, the court determined that the district court's award of fees and expenses was improper. Pet. App. 3-4.

ARGUMENT

Petitioners argue (Pet. 5-11) that certiorari is warranted because the court of appeals' decision conflicts with decisions of this Court construing the waiver of sovereign immunity in the Federal Torts Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The court of appeals correctly held, however, that the FTCA does not waive the United States' sovereign immunity for attorneys' fees and expenses. The court of appeals' decision is consistent with the precedent of this Court and does not conflict with the decision of any other court of appeals. The petition for a writ of certiorari should therefore be denied.

1. Petitioners err in contending (Pet. 5-7) that 28 U.S.C. 2674, which provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances," waives sovereign immunity for attorneys' fees in this case. As all the courts of appeals that have addressed the issue have concluded, the FTCA does not waive the government's sovereign immunity for attorneys' fees and expenses. See Pet. App. 1-5; *Jackson* v. *United States*, 881 F.2d 707, 712 (9th Cir. 1989); *Bergman* v. *United States*, 844 F.2d 353, 357 (6th Cir. 1988); *Johnson* v. *United States*, 780 F.2d 902, 910 (11th Cir. 1986); *Joe* v. *United States*, 772 F.2d 1535, 1536-1537 (11th Cir. 1985). Section 2674 does not mention attorneys' fees, and it therefore fails to provide the requisite express waiver of sovereign immunity. *Johnson*, 780 F.2d at 910; *Joe*, 772 F.2d

at 1536-1537. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 267-268 & n.42 (1975). Indeed, petitioners themselves acknowledge (Pet. 12) that the court of appeals reached the same conclusion as the Eleventh Circuit, which has twice held that a state statute that provides for attorneys' fees against private parties does not furnish a basis for awarding fees against the United States under the FTCA. *Johnson*, 780 F.2d at 910; *Joe*, 772 F.2d at 1536-1537.

The conclusion of the courts of appeals is consistent with this Court's precedent As this Court has made clear, the United States is not liable for attorneys' fees unless that liability is "expressly provided for by statute." *Alyeska Pipeline Co.*, 421 U.S. at 267-268; see also *Ruckelshaus*, 463 U.S. at 685. Where, as here, the applicable federal statute does not contain an express waiver, an award of attorneys' fees against the United States is not permitted.

2. Petitioners argue (Pet. 6-7), however, that the dictionary definition of "liability" extends to "any type of exposure or obligation, not just exposure or obligation to pay damages." Petitioners reason that, because Section 2674 provides that the United States "shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances," Congress intended to include attorneys' fees within the scope of the waiver. Petitioners' argument misses the point. The relevant question is not whether, in the abstract, the word "liability" might include attorneys' fees, but rather whether Section 2674 clearly and unambiguously waives the government's sovereign immunity specifically for attorneys' fees in FTCA cases.

In fact, Section 2674 does not independently waive the immunity of the United States at all. In interpreting the FTCA, the Court begins with 28 U.S.C. 1346(b), "[t]he principal provision" of the FTCA. *Smith* v. *United States*, 507 U.S. 197, 201 (1993) (internal quotation marks omitted). Section 1346(b)—not Section 2674—"delineates the scope of the United States' waiver of sovereign immunity." *Smith*, 507 U.S. at 201.* In Section 1346(b), Congress waived sovereign immunity for "claims against the United States, for money damages * * * for injury * * * caused by the negligent or wrongful act or omission" of a government employee "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable" under state law. 28 U.S.C. 1346(b). Section 2674 provides that the United States "shall be liable, *respecting the provisions of this title relating to tort claims*." 28 U.S.C. 2674 (emphasis added). By its express incorporation of the other Sections of the FTCA, Section 2674 extends the liability of the

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* Petitioners incorrectly assert that this Court held in *Molzof* v. *United States*, 502 U.S. 301, 306 (1992), that Section 2674 also provides a waiver of immunity. The Court looked to Section 2674 in *Molzof* because that Section contains the *exception* to liability for punitive damages, not because the Section contains the waiver of immunity itself. Although other provisions of the FTCA certainly "modify the waiver" (Pet. 11) in Section 1346(b), they modify the waiver by *limiting* it rather than by *expanding* it, as petitioners seek here. See *Molzof*, 502 U.S. at 306 (construing scope of exception for liability for punitive damages in Section 2674); *Berkovitz* v. *United States*, 486 U.S. 531, 535 (1988) (construing scope of discretionary function exception in 28 U.S.C. 2680); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (construing statute of limitations in 28 U.S.C. 2401(b)).

United States *only* as far as provided by other FTCA Sections. The term "liable" in Section 2674 is thus restricted to claims that are within the scope of the waiver of sovereign immunity in Section 1346(b).

As this Court has recognized, under the FTCA, the United States is "not liable for the entire range of conduct classified as tortious under state law." *Library of Congress* v. *Shaw*, 478 U.S. 310, 320 (1986). In *Laird* v. *Nelms*, 406 U.S. 797 (1972), for example, this Court held that the United States cannot be strictly liable for ultrahazardous activities under the FTCA even when a private party would be liable for such activities under state law. *Id.* at 799-803. The Court explained that "[r]egardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of misfeasance or nonfeasance * * * on the part of the Government." *Id.* at 799 (internal quotation marks and citation omitted). Section 1346(b) contains that limitation but Section 2674 does not. *Nelms* thus confirms that the term "liability" in Section 2674 is limited by Section 1346(b). In sum, the dictionary definitions of "liability" that petitioners cite are unavailing because they do not reflect the context in which that term is used in the FTCA.

3. Petitioners also argue (Pet. 6) that because Congress excepted only prejudgment interest and punitive damages from the scope of Section 2674, attorneys' fees are therefore included within the FTCA's waiver of sovereign immunity. That argument lacks merit.

First, Congress' failure to exclude attorneys' fees by an exception in Section 2674 does not satisfy the requirement that Congress expressly waive sover-

eign immunity for those fees. *Ruckelshaus*, 463 U.S. at 685; *Joe*, 772 F.2d at 1536-1537. The sole reference to attorneys' fees in the FTCA, Section 2678, does not make the United States liable for a plaintiff's attorneys' fees but rather limits those fees to twenty-five percent of the judgment, to be taken directly from the judgment itself. See *Hull By Hull* v. *United States*, 971 F.2d 1499, 1510 (10th Cir. 1992), cert. denied, 507 U.S. 1030 (1993); *Joe*, 772 F.2d at 1536-1537; 28 U.S.C. 2678.

Second, as explained above, the waiver of sovereign immunity in the FTCA is limited to actions for "money damages." Congress had no need to except attorneys' fees, because those fees are not encompassed in the term "money damages." See *Jackson*, 881 F.2d at 712. As this Court has explained, "[o]rdinarily a statutory right to 'damages' does not include an implicit authorization to award attorney's fees." *Summit Valley Indus., Inc.* v. *Local 112, United Bhd. of Carpenters*, 456 U.S. 717, 722 (1982). See also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 277 (1994) (noting that attorneys' fee determinations are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial" (internal quotation marks and citations omitted)). Contrary to petitioners' argument, "the American Rule presumes that the word 'damages' means damages exclusive of fees." *Summit Valley Indus., Inc.*, 456 U.S. at 722-723. Prejudgment interest and punitive damages, on the other hand, are both considered "money damages," and Congress therefore needed to make clear its intent to exclude them from the scope of Section 1346(b). See *Shaw*, 478 U.S. at 321.

Petitioners nonetheless contend (Pet. 7-8) that this Court has interpreted the waiver of sovereign immunity in the FTCA broadly, and therefore the district court properly awarded attorneys' fees and expenses, because Congress did not expressly except attorneys' fees from that waiver. But the rules of sovereign immunity are not suddenly reversed simply because the courts are interpreting the FTCA. Indeed, this Court has noted that it will take care not to extend the waiver of sovereign immunity in the FTCA "beyond that which Congress intended." *Smith*, 507 U.S. at 203. And this Court's cases are clear that the federal government is immune from attorneys' fees "[e]xcept to the extent that it has waived its immunity." *Ruckelshaus*, 463 U.S. at 685; *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. at 267-268 & n.42.

In support of their argument, petitioners rely (Pet. 7-8) solely on cases that are inapposite. None of the cases cited by petitioners involved a claim for attorneys' fees under the FTCA. Instead, all the cases involved claims for money damages that related to the government's substantive liability. See *Berkovitz* v. *United States*, 486 U.S. 531 (1988); *Kosak* v. *United States*, 465 U.S. 848 (1984); *Block* v. *Neal*, 460 U.S. 289 (1983); *United States* v. *Muniz*, 374 U.S. 150 (1963); *Rayonier* v. *United States*, 352 U.S. 315 (1957); *Dalehite* v. *United States*, 346 U.S. 15 (1953); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). Moreover, petitioners cite those cases for the proposition (Pet. 8) that *exceptions* to the FTCA's waiver of sovereign immunity must be express. That principle is not relevant here, because attorneys' fees

are not within the scope of the waiver of sovereign immunity in the first instance.

4. Petitioners' reliance (Pet. 9-10) on the fact that the FTCA, when first enacted, specifically excluded attorneys' fees awards against the United States similarly fails to advance their cause. Waivers of the sovereign immunity of the United States "must be unequivocally expressed in statutory text * * * and will not be implied." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996) (internal citations omitted). Accordingly, a waiver of sovereign immunity cannot be inferred from what Congress did *not* say in the FTCA.

In any event, contrary to petitioners' contention (Pet. 9), Congress has not "repealed the attorneys fee exception" in the FTCA. As petitioners acknowledge, in 1948 Congress did not eliminate the express prohibition against attorneys' fees in the FTCA; rather, Congress moved that prohibition to 28 U.S.C. 2412(c). See Pet. 9 (citing Pub. L. No. 773, Ch. 161, § 2412(c), 62 Stat. 973). See also *Alyeska Pipeline Co.*, 421 U.S. at 268 n.42 (explaining that the purpose of Section 2412 was to make "specific exceptions [with respect to the United States' liability for fees and costs] unnecessary"). And, although the language of the current Equal Access to Justice Act (EAJA) no longer refers to Section 1346(b), it nonetheless specifically excludes "cases sounding in tort" from its waiver of sovereign immunity for attorneys' fees and expenses. 28 U.S.C. 2412(d)(1)(A).

Moreover, in 1966, when Congress amended Section 2678 to raise the limit on attorneys' fees from twenty to twenty-five percent of the judgment, its purpose was to "'assure competent representation and reasonable compensation' in matters litigated under the FTCA." *Joe*, 772 F.2d at 1537 (quoting S.

Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966)). As the Eleventh Circuit has observed,

> [i]f Congress had intended * * * to encourage attorneys to bring FTCA claims not by increasing the percentage of the judgment available to attorneys but, instead, by providing for an award of attorneys' fees from the United States, Congress could easily have done so.

Joe, 772 F.2d at 1537. Indeed, by explaining that "[t]he actual amount of attorneys' fees within the statutory limits * * * is made a matter for determination between the litigant and his attorney," Congress revealed its intent that attorneys' fees be taken from, not provided in addition to, the plaintiff's damages award. S. Rep. No. 1327, *supra*, at 8; see *Joe*, 772 F.2d at 1537.

In short, when Congress intends to waive sovereign immunity for attorneys' fees, it does so expressly. See, *e.g.*, 28 U.S.C. 2412(d)(1)(A) (EAJA); 42 U.S.C. 2000e-5(k) (Title VII). Because Congress has not done so here, the court of appeals' holding is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1997

TRACI ANDERSON and CYNTHIA IRONS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The government does not argue an award of attorneys fees falls outside the plain language of 28 U.S.C. §2674, which provides,

> The United States *shall be liable* [under the FTCA] *in the same manner and to the same extent as a private individual under like circumstances . . .*

(Emphasis added.) Instead, it says only a statute which "mention[s] attorneys' fees" can "provide the requisite express waiver of sovereign immunity." (Brief in Opp. p. 3.) But requiring a mention of "attorneys fees" is only another way of applying a principle of narrow construction which this Court has repeatedly rejected in FTCA cases. (*See*, Pet. p. 6-8.) "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas v. United States*, 118 S.Ct. 469, 475 (1997). And 28 U.S.C. §2674 is unambiguous in its incorporation of all state law remedies but for specified exceptions.

Although the government argues the Ninth Circuit's decision is "consistent with the precedent of this Court" (Brief in Opp. p. 3), it cites no decision by this Court endorsing a rule of narrow construction of the waiver of sovereign immunity in the FTCA. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983), simply holds Congress "would have said so in far plainer language than" it used, if it in fact intended to make the United States liable for the *losing* party's

attorneys fees under the Clean Air Act. And in any event *Ruckelshaus'* language on construing waivers of sovereign immunity is in clear tension with the principles this Court has set over the past fifty years for construing the waiver in the FTCA. *See*, 463 U.S. at 685. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), does not involve an award of attorneys fees against the United States. And in any event it does not address the standards for construing the waiver in the FTCA either.

Finally, the government argues the Equal Access to Justice Act "specifically excludes 'cases sounding in tort' from its waiver of sovereign immunity for attorneys' fees and expenses. 28 U.S.C. 2412(d)(1)(A)." (Brief in Opp. p. 9.) But all this exclusion does is implicitly allow state law to govern the availability of attorneys fees and expenses in tort claims against the United States. Here, state law, as incorporated by the FTCA, permits just such an award.

DATED: March 26, 1998.

Respectfully submitted,

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